

**CERTIFIED FOR PARTIAL PUBLICATION\***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRELL TYJUAN ALLEN,

Defendant and Appellant.

A093927

(Contra Costa County  
Super. Ct. No. 0013722)

Defendant Darrell Allen was sentenced to nine years in prison after a jury convicted him of theft, receiving stolen property, possession of a firearm, and resisting arrest. On appeal, he contends the prosecutor impermissibly exercised peremptory challenges to remove two African-American women from his jury. (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).) He also contends the trial court erred by failing to give a unanimity instruction regarding the receiving stolen property count and by giving CALJIC No. 17.41.1. While in the unpublished portion of this opinion we reject one of defendant's asserted instructional errors, and find it unnecessary to determine the prejudicial effect of the other, in the published portion we consider whether the judgment must be reversed because the trial court failed to correct the prosecutor's impermissible use of peremptory challenges. After this court had concluded that reversal is required on this ground, the Supreme Court remanded the case for reconsideration in light of the intervening decision in *People v. Reynoso* (2003) 31 Cal.4th 903 (*Reynoso*). We have carefully reviewed that decision, and

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\* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I.A., I.C., II.B., and II.C.

conclude that there are significant differences between the facts of that case and this, so that our initial conclusion remains correct. Hence, we again reverse.

## **I. FACTUAL AND PROCEDURAL HISTORY**

### **A. The Offense**<sup>\*</sup>

On August 28, 2000, Kenneth Moore returned home from work and found that someone had broken in to his residence and stolen some personal jewelry, two cameras and a cell phone. Moore called the police and described two “Black kids” who had waived to him minutes before as he was coming down his street.

The police set up a perimeter around the area and just after 2:00 p.m. Officer William Bennett saw two Black males meeting Moore’s description walking down the street. Bennett stopped his car and approached the two men. The older man, later identified as the defendant, was carrying a black duffel bag. As Bennett approached, the defendant dropped the bag and the two men ran in opposite directions. Bennett recovered the bag and found inside a DVD player, t-shirts, a camera, and two loaded handguns. With the assistance of additional officers, both defendant and the other man were caught and arrested. After their arrests, the other man, who turned out to be defendant’s cousin, led the police to some bushes near Mr. Moore’s home, where Moore’s property was recovered.

About 4:30 p.m. on the same day, Anthony Picchi returned home from work to find that his home had been burglarized. His door had been kicked down and he was missing two handguns, ammunition, a DVD player, CDs, two cameras, a cell phone, six or nine t-shirts, and a black duffel bag. He also reported the burglary to the police.

At trial, defendant testified that he had spent the previous night at his cousin’s apartment and had been playing video games when his cousin went out. When he went outside to look for his cousin, he saw him walking towards him carrying a black bag. As they met, an officer arrived and ordered them at gunpoint to get on the ground. His cousin ran. Defendant also ran because he thought he had an outstanding warrant and

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<sup>\*</sup> Part I.A. of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

probation fine. He denied going to the home of Moore or Picchi or stealing any property, and said that he had not been holding the black bag when Bennett drove up.

Defendant was charged by information with first degree residential burglary of the Moore and Picchi homes, a violation of Penal Code sections 459 and 460, subdivision (a)<sup>1</sup> (counts one and three), grand theft of personal property of the two victims, a violation of section 487, subdivision (a) (counts two and four), grand theft of a firearm, a violation of section 487, subdivision (d) (counts five and six), receiving stolen property, a violation of section 496, subdivision (a) (count seven), possession of a firearm by a felon, a violation of 12021, subdivision (a)(1) (count eight), and resisting, obstructing or delaying a peace officer, a violation of section 148, subdivision (a)(1) (count nine). The information also alleged a prior serious felony under Penal Code section 667, subdivision (a)(1), and a prior strike under Penal Code section 667, subdivisions (b) through (i).

**B. Jury Selection**

At the start of the jury trial the trial judge conducted voir dire of the potential jurors including two African-American women later challenged by the prosecutor.<sup>2</sup> Ms. W. stated that she was a benefit authorizer with the Social Security Administration and that her home had been burglarized about four years prior. She confirmed that despite the burglary experience, she believed she could be fair to both sides. Ms. T. stated that she was a program analyst for Kaiser and that she had two cousins who worked in law enforcement. The court also asked her why she did not answer question number 11 on the juror questionnaire that asked: “Do you have any moral, religious or other principles which would make it difficult to determine whether someone’s guilty or not guilty of a crime?” Ms. T. answered: “Because I think moral or religious and other covers a wide range, and I’d like for this to address this particular situation. I would be fair and impartial or try to be fair and impartial. I just circled it because I didn’t understand what was being asked of me at the time.” She then confirmed without

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise noted.

<sup>2</sup> The relevant portion of the transcript of voir dire is set forth in the appendix, *post*.

reservation that she could make her decision based upon the law that the court would give her, the evidence she would hear or see in the courtroom, and her common sense, and not any other preconceived notion.

The prosecutor exercised his third peremptory challenge to excuse Ms. W. After he excused Ms. T. with his sixth peremptory challenge, defense counsel made a *Batson/Wheeler* motion to dismiss the jury panel and recommence jury selection based upon the prosecutor's impermissible use of peremptory challenges. The trial judge found that a prima facie case of discrimination had been made, stating that he could not understand why the prosecutor had excused the two potential jurors. The judge asked the prosecutor for his reasons. As to Ms. W., the prosecutor's explanation, in full, was as follows: "The first woman, her very response to your answers, and her demeanor, and not only dress but how she took her seat. I don't know if anyone else noticed anything but it's my experience, given the number of trials I've done, that that type of juror, whether it's a personality conflict with me or what have you, but they tend to, in my opinion, disregard their duty as a juror and kind of have more of an independent thinking." As to Ms. T., the prosecutor explained in full: "Ms. T. I had intended to leave on the panel when I passed the first time. Then I remembered that she circled No. 11, and I had put a note on my pad, and I didn't see it when I said pass the first time. And I remembered that she had questions as to what religious or moral convictions meant, and that concerned her, and that gave me concern that she would question things that may be evident on their face and may not make the sort of juror that I would like for that reason." The court denied defendant's motion without asking the prosecutor any questions and without making any findings with respect to the proffered explanations.

C. Verdict and Judgment\*

After a four-day trial, the jury found defendant guilty of counts four through nine, but deadlocked on counts one through three, to which the court declared a mistrial. The

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\* Part I.C. of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

trial court sentenced defendant to a prison term of nine years,<sup>3</sup> and defendant filed a notice of appeal on the same day.

## II. DISCUSSION

### A. Defendant's Batson/Wheeler Motion

Defendant contends that the trial court erred by denying his *Batson/Wheeler* motion. He submits that the prosecutor's reasons for challenging the only two African-American jurors in the box were not sufficiently specific to adequately explain any possible race-neutral reasons for doing so. Defendant also argues that the trial court failed to make a sincere, serious and reasoned inquiry into the prosecution's explanations.

Under article I, section 16 of the California Constitution, a defendant's right to trial by a representative jury is violated by the use of peremptory challenges to exclude jurors solely on the basis of group bias. (*Wheeler, supra*, 22 Cal.3d 258.) *Batson* affords similar protection to an accused under the federal Constitution's Equal Protection Clause. A court initially presumes that a party exercising peremptory challenges does so on a constitutionally permissible ground. (*Wheeler, supra*, 22 Cal.3d at p. 278.) A defendant who claims impermissible use has the initial burden of establishing a prima facie case of purposeful discrimination. (*People v. Williams* (1997) 16 Cal.4th 635, 663-664.)

“ ‘[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination . . . , the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation . . . .’ ” (*People v. Silva* (2001) 25 Cal.4th 345, 384.) “The party seeking to justify a suspect excusal need only offer a genuine, reasonably specific, race- or group-neutral explanation related to the particular case being tried. [Citations.] The justification need not support a challenge for cause, and even a ‘trivial’ reason, if genuine and neutral, will suffice.” (*People v. Arias* (1996)

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<sup>3</sup> The trial court found true the enhancements based upon defendant's prior felony conviction. The trial court sentenced defendant to four years on count four (grand theft) and a consecutive five-year term for count eight (possession of a firearm by a felon). Defendant was sentenced on the remaining counts but his sentence stayed pursuant to section 654.

13 Cal.4th 92, 136.) A prospective juror may be excused based upon bare looks and gestures, hunches, and even arbitrary reasons. (See *People v. Turner* (1994) 8 Cal.4th 137, 165, 171.) For example, in *People v. Turner, supra*, the court upheld a peremptory challenge where the juror's body language seemed angry and hostile. (*Id.* at p. 170.) Similarly, in *People v. Johnson* (1989) 47 Cal.3d 1194, 1217-1218, the court found no impropriety where the prosecutor excused prospective jurors who looked nervous, who looked tired, who looked weird, who seemed unable to relate to the prosecutor, who had a very defensive body position, who were overweight and poorly groomed and seemed not to trust the prosecutor. As noted in *Wheeler*, "even less tangible evidence of potential bias may bring forth a peremptory challenge: either party may feel a mistrust of a juror's objectivity on no more than the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another' [citation]—upon entering the box the juror may have smiled at the defendant, for instance, or glared at him." (*Wheeler, supra*, 22 Cal.3d at p. 275.)

"If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination." (*People v. Silva, supra*, 25 Cal.4th at p. 384.) "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . ." (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.) "[A] truly 'reasoned attempt' to evaluate the prosecutor's explanations [citation] requires the court to address the challenged jurors individually to determine whether any one of them has been improperly excluded. In that process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes* (1991) 54 Cal.3d 707, 720.) "Preferably, in ruling on a *Wheeler* motion, the trial court should state expressly its determination as to the adequacy of the justification proffered with respect to each peremptory challenge." (*People v. Sims* (1993) 5 Cal.4th 405, 431.) Because

*Wheeler* motions call upon trial judges' personal observations, appellate courts generally accord great deference to their determination that a particular reason is genuine. (*People v. Silva, supra*, 25 Cal.4th at pp. 385-386.) However, "we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. [Citations.] When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*Id.* at p. 386.)

In *Silva*, the California Supreme Court held that the trial court failed to conduct a sincere and reasoned determination of the genuineness of the prosecutor's proffered explanations for exercising his peremptory challenges. (*People v. Silva, supra*, 25 Cal.4th 345.) The court concluded that because the prosecutor gave reasons that misrepresented the record of voir dire, by quoting a misleading portion of a prospective juror's answers concerning the death penalty, "the trial court erred in failing to point out the inconsistencies and to ask probing questions." (*Id.* at pp. 376-377, 385; see also *People v. Turner* (1986) 42 Cal.3d 711, 727-728 (*Turner*).)

Similar obligations of inquiry and analysis exist under federal law. For example, in *U.S. v. Sherrills* (8th Cir. 1991) 929 F.2d 393, 395, the court recognized that while inattentiveness may be a legitimate explanation, "determining who is and who is not attentive requires subjective judgments that are particularly susceptible to the kind of abuse prohibited by *Batson* . . . . [¶] These factors make the district court's observations particularly crucial. We believe a prosecutor's explanation of challenges on the grounds of inattentiveness deserves careful scrutiny by the district court, and special care by counsel to fully develop the record concerning the specific behavior by the venire members motivating counsel to make a peremptory challenge based on inattentiveness." (See also *Jordan v. Lefevre* (2nd Cir. 2000) 206 F.3d 196, 200 [it is "error for the trial court to deny a *Batson* motion without explicitly adjudicating the credibility of the non-moving or challenging party's race neutral explanations for its action in peremptorily

striking potential jurors”]; *Hatten v. State* (Miss. 1993) 628 So.2d 294, 295-296, 298 [requiring the trial judge to make an on-the-record factual determination of each reason proffered by the State, including those based upon demeanor, protects the rights of defendant and potential jurors as well as makes a clear record for purposes of appellate review]; *Williams v. State* (Fla.App. 4 Dist. 1989) 547 So.2d 179 [where the state challenges a venireman for being inattentive, that rationale will be deemed pretextual unless the state’s rationale is either an uncontested matter of fact or is supported by observations made by the trial judge in the record].)

In *Reynoso*, the California Supreme Court first acknowledged that in *People v. Fuentes*, *supra*, 54 Cal.3d 707, it had “ ‘reemphasize[d] the trial court’s role in making an adequate record when dealing with a *Wheeler* motion. Notwithstanding the deference we give to a trial court’s determinations of credibility and sincerity, we can only do so when the court has clearly expressed its findings and rulings and the bases therefore.’ (*Id.* at p. 716, fn. 5.)” (*Reynoso*, *supra*, 31 Cal.4th at p. 929.) The court went on, however, to point out that “neither *Fuentes* nor *Silva* requires a trial court to make explicit and detailed findings for the record in every instance in which the court determines to credit a prosecutor’s demeanor-based reasons for exercising a peremptory challenge. . . . [¶] Where . . . the trial court is fully apprised of the nature of the defense challenge to the prosecutor’s exercise of a particular peremptory challenge, where the prosecutor’s reasons for excusing the juror are neither contradicted by the record nor inherently implausible . . . , and where nothing in the record is in conflict with the usual presumptions to be drawn, i.e., that all peremptory challenges have been exercised in a constitutional manner, and that the trial court has properly made a sincere and reasoned evaluation of the prosecutor’s reasons for exercising his peremptory challenges, then those presumptions may be relied upon, and a *Batson/Wheeler* motion denied,



notwithstanding that the record does not contain detailed findings regarding the reasons for the exercise of each such peremptory challenge.” (*Ibid.*)<sup>4</sup>

In *Reynoso*, the court’s analysis was based on the premise that the prosecutor, in the second step of the procedure for evaluating a *Batson/Wheeler* motion, had given meaningful “occupation- and demeanor-based reasons” for excusing the prospective juror in question, Elizabeth G. (*Reynoso, supra*, 31 Cal.4th at p. 926; see also p. 920.) There, the prosecutor explained that he had excused Elizabeth G. because she was a customer service representative who he felt did not have enough educational experience, and because it appeared to him that she was not paying attention to the proceedings. (*Id.* at pp. 911, 923-926.) The prosecutor’s reasons were intelligible, and the only question was whether the trial court had satisfied its obligation to properly ensure that they were “sincere and legitimate.” (*Id.* at p. 924.) The prosecutor’s demeanor-based reasons—that Elizabeth G. was not paying attention to the proceedings and was not involved in the voir dire process—“were not too general or too vague and could validly support the peremptory excusal of Elizabeth G. if the reasons were shown to be sincere and genuine.” (*Id.* at p. 920; see also pp. 925-926.) The *Reynoso* court emphasized that the trial court should not focus on the objective reasonableness of those reasons, but on their subjective genuineness. (*Id.* at p. 924.)

Here, the trial court found that defendant made a *prima facie* showing of discrimination and the People do not challenge that finding on appeal. The prosecutor excused the only two African-American jurors in the jury box, both of whom had experiences or contacts that normally would be considered favorable to the prosecution,

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<sup>4</sup> Earlier in the *Reynoso* majority opinion, the court said essentially the same thing in these words: “[I]n fulfilling [the obligation to make a sincere and reasoned attempt to evaluate the prosecutor’s explanation for a peremptory challenge], the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor’s race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the prosecutor’s race-neutral reason for exercising a peremptory challenge is based on the prospective juror’s demeanor, or similar intangible factors, while in the courtroom.” (31 Cal.4th at p. 919.)

thereby demonstrating “a strong likelihood that they were challenged because of their group association.” (*People v. Williams, supra*, 16 Cal.4th at pp. 663-664.) Thus, we move directly to an evaluation of the prosecutor’s proffered explanations.

The prosecutor’s reason for excluding Ms. T. is at best problematic. He excused her because “she had questions as to what religious or moral convictions meant, and that concerned her, and that gave me concern that she would question things that may be evident on their face and may not make the sort of juror that I would like for that reason.” While this explanation is racially neutral, it misstates the record. Ms. T. said that she did not understand what question number 11 was asking, not that she had questions as to what religious or moral convictions meant. Additional explanation and probing would have been helpful, but we need not pursue Ms. T.’s situation further and shall assume that the trial court was justified in accepting the prosecutor’s explanation for excusing her.

Whatever doubts there may be as to the sufficiency of the explanation for challenging Ms. T., the prosecutor’s reasons for excusing Ms. W. are incomprehensible, and there is nothing in the record to give them content. In *Reynoso*, the prosecutor did not explain his demeanor-based challenge by simply telling the judge that he did not like Elizabeth G.’s “demeanor,” but he explained that the prospective juror did not appear to be paying attention, and the reviewing courts were able to agree that “ ‘a somewhat inattentive prospective juror would be an appropriate concern.’ ” (31 Cal.4th at p. 920.) But simply saying that a peremptory challenge is based on “her demeanor” without a fuller description of what the prospective juror was or was not doing provides no indication of what the prosecutor observed, and no basis for the court to evaluate the genuineness of the purported non-discriminatory reason for the challenge. “[H]er very response to your answers,” her “dress” and “how she took her seat” without additional elaboration are not responses that can be evaluated by the trial judge, and they certainly cannot be evaluated on appeal.<sup>5</sup> What specifically was Mrs. T. wearing, in what manner

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<sup>5</sup> The People suggest that Ms. W’s peremptory challenge was also based upon her soft-spoken demeanor because the court asked her at the beginning of voir dire to speak

did she sit down that gave the prosecutor concern, and what response to which of the judge's questions led him to the conclusion that she would disregard her duty as a juror and think independently? What is reflected in the record is Ms. W.'s repeated affirmation that, despite the prior burglary of her home, she believed she could be fair to both sides. While the trial judge presumably was in a position to observe Ms. W.'s dress and may or may not have observed how she seated herself, the judge could only guess what the prosecutor found troubling about them. Absent some additional explanation or probing by the court, the prosecutor's reasons were simply "too general" and "too vague" for the court to possibly evaluate. (Cf. *Reynoso*, *supra*, 31 Cal.4th at p. 920.) They were hardly sufficient to demonstrate that the peremptory challenges were exercised "on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses—i.e., for reasons of specific bias as defined [in *Wheeler*]." (*Wheeler*, *supra*, 22 Cal.3d at pp. 281-282.)

In this respect, this case is remarkably similar to *Turner*, *supra*, 42 Cal.3d at page 725, in which the California Supreme Court rejected the prosecutor's proffered race-neutral explanation that "'something in [the juror's] work' would 'not be good for the People's case' [as] so lacking in content as to amount to virtually no explanation.'"<sup>6</sup> The

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up. The prosecutor, however, gave no such explanation at the time and this argument would appear to contradict the prosecutor's concern that she might think independently. Moreover, the record hardly supports the People's characterization of Ms. W. as soft-spoken. At the start of her voir dire, the court asked Ms. W. whether she had been able to hear all the questions asked so far. She replied "Yes." The court said, "I'm sorry," to which she repeated "Yes, sir." The court then reminded her that the court reporter had to take down what she says and so she would have to speak up. There were no further remarks made about the volume of Ms. W.'s voice. In any event, "our concern is with the explanation the prosecutor gave to the trial court, not with a theory subsequently devised by the Attorney General for consumption on appeal." (*Turner*, *supra*, 42 Cal.3d at p. 722, fn. 7.)

<sup>6</sup> The prosecution's explanation in full was as follows: "'As far as the excusing of the woman, I don't remember exactly, but I think it was something in her work as to that she was doing that from our standpoint, that background was not—would not be good for

*Turner* court stated, “If such vague remarks were held to satisfy the prosecution’s burden of rebutting a prima facie case of group discrimination, the defendant’s constitutional right to trial by a jury drawn from a representative cross-section of the community could be violated with impunity.” (*Ibid.*) Similarly, in *Batson, supra*, the United States Supreme Court held that “the prosecutor must give ‘clear and reasonably specific’ explanation of his ‘legitimate reasons’ for exercising the challenges.” (476 U.S. at p. 98, fn. 20.) “[T]he prosecutor [may not] rebut the defendant’s [prima facie] case merely by denying that he had a discriminatory motive or ‘affirm[ing] [his] good faith in making individual selections.’ [Citation.] If these general assertions were accepted as rebutting a defendant’s prima facie case, the Equal Protection Clause ‘would be but a vain and illusory requirement.’ [Citation.]” (*Id.* at p. 98; see also *Com. v. Rodriguez* (Mass. 2000) 731 N.E.2d 71, 75-76 [defense attorney’s explanation that he struck juror because “[the defendant] does not like her looks’ ” without further specificity is insufficient to justify ninth peremptory challenge of female juror, because explanation “does not describe qualities particular to the prospective juror” and “defense counsel could have made the same statement about every woman”]; *Hatten v. State, supra*, 628 So.2d at pp. 296, 298, [prosecutor’s explanation that he “ ‘did not like the appearance of [a juror], felt that he would not be a good juror to hear this case’ ” was properly rejected as pretextual and “ ‘ . . . may well have served as masks for actually racially discriminatory purposes’ ”].)

As in *Turner, supra*, 42 Cal.3d 711,<sup>7</sup> the inadequacy of the prosecutor’s explanation was compounded by the manner in which the trial court addressed

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the People’s case. And I excused her, along with quite a few other people, too, for the same reason.’ ” (*Turner, supra*, 42 Cal.3d at p. 725.)

<sup>7</sup> The *Turner* court concluded that “the inadequacy of the prosecutor’s reasons was compounded by the [trial] court’s apparent acceptance of those reasons at face value.” (42 Cal.3d. at p. 727.) “In each instance the court listened to the prosecutor without question and promptly denied the motion without comment. As we have seen, however, the prosecutor’s explanations were either implausible or suggestive of bias. They therefore ‘demanded further inquiry on the part of the trial court’ [citation], followed by a

defendant's motion. While *Reynoso* holds that the trial judge was not required "to make explicit and detailed findings for the record" so long as the prosecutor's reasons "are neither contradicted by the record nor inherently implausible" and "nothing in the record is in conflict with the usual presumptions to be drawn" (31 Cal.4th at p. 929), the Supreme Court did not there indicate that the trial court should be presumed to have properly made a sincere and reasoned evaluation of the prosecutor's reasons for exercising his peremptory challenges when the prosecutor's explanation is so vacuous that it precludes evaluation. In light of the vague and unsupported reasons offered by the prosecutor, additional inquiry was necessary. (*People v. Fuentes, supra*, 54 Cal.3d at p. 719; *Turner, supra*, 42 Cal.3d at p. 728; *Jordan v. Lefevre, supra*, 206 F.3d at p. 200.) While specific findings were not required, probing into what specifically about Ms. W.'s body language, dress and demeanor the prosecutor disliked presumably would have provided descriptions which the court could have evaluated in determining the genuineness of the proffered explanation.<sup>8</sup> If the explanation given by the prosecutor here were deemed sufficient, the entire point of requiring an explanation would be vitiated. All the prosecutor would need do is repeat the mantra that he did not like the prospective juror's "demeanor" or clothing, and the trial court would be entitled to presume that the prosecutor was not influenced by the race or ethnicity of the prospective juror. Such a conclusion would effectively eliminate the second step of the *Batson/Wheeler* analysis and would be at odds with *Turner*, a decision which the majority in *Reynoso* did not cite and certainly did not overrule.<sup>9</sup>

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"sincere and *reasoned*" effort by the court to evaluate their genuineness and sufficiency in light of all the circumstances of the trial." (*Id.* at pp. 727-728.)

<sup>8</sup> Alternatively, although not required to do so, had the trial judge placed his own observations on the record, that may well have provided a sufficient basis for understanding the basis on which the peremptory challenge was made, at least if the prosecutor acquiesced in the court's recitation.

<sup>9</sup> Moreover, unlike the situation in *Reynoso* where the prosecutor passed and accepted the jury 14 times with the Hispanic prospective juror ultimately excused seated in the jury box (31 Cal.4th at p. 926), here the prosecutor immediately challenged Ms. W. and

Thus, the trial court erred in accepting the prosecutor's meaningless explanation for having excused Ms. W. and implicitly finding on the basis of that explanation that the prosecutor met his burden to overcome the prima facie case of discrimination. The trial court did not satisfy its *Batson/Wheeler* obligations, and the conviction unfortunately must be reversed. Such "error is prejudicial per se: 'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.' " (*People v. Wheeler, supra*, 22 Cal.3d at p. 283.)<sup>10</sup>

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passed only once with Ms. T. seated on the jury before challenging her. While the Supreme Court reasoned that the trial court in *Reynoso* could have relied upon the prosecutor's repeated acceptance of the jury containing the individual later excused as "an indication of the prosecutor's good faith in exercising his peremptories" (*ibid.*), there could have been no such reliance in this case.

<sup>10</sup> While *Wheeler* error has been deemed reversible per se in light of the fundamental right involved, remand for a further hearing on the issue may be ordered in appropriate cases. (*People v. Williams* (2000) 78 Cal.App.4th 1118, 1125; *People v. Gore* (1993) 18 Cal.App.4th 692, 706; *People v. Snow* (1987) 44 Cal.3d 216, 226-227.) "Ordinarily, factors to be considered in determining whether remand is appropriate are the length of time since voir dire, the likelihood that the court and counsel will recall the circumstances of the case, the likelihood that the prosecution will remember the reasons for the peremptory challenges, as well as the ability of the trial judge to recall and assess the manner in which the prosecutor examined the venire and exercised other peremptory challenges." (*People v. Williams, supra*, 78 Cal.App.4th at p. 1125.) This, however, does not appear to be an appropriate case. Voir dire in this case was conducted over three years ago, it was a short and unremarkable trial, and the limited information in the record is unlikely to trigger reasonably accurate memories of Ms. W.'s dress and demeanor by the prosecutor and the judge. (Compare with *People v. Gore, supra*, 18 Cal.App.4th at p. 706 [limited remand appropriate because case was a death penalty case, and therefore it was "likely counsel and the court paid close attention to and are more likely to remember the specifics of voir dire as opposed to less serious cases"].)

B. CALJIC No. 17.01\*

Defendant argues that the trial court was required sua sponte to give a unanimity instruction, CALJIC No. 17.01, with respect to count seven because defendant was charged with only one count of receiving stolen property but the record discloses evidence of two possible violations which could have supported a guilty verdict.<sup>11</sup> He suggests that different jurors may have found him guilty based upon his possession of Mr. Moore's property or Mr. Picchi's property. The Information, however, charges defendant with possession of only the type of property stolen from Mr. Picchi's home, not the items stolen from Mr. Moore's home, and the prosecutor's argument reinforced that this count was based solely on defendant's possession of the black duffel bag containing Mr. Picchi's property. Moreover, the jury clearly based the verdict on defendant's possession of Mr. Picchi's property as it deadlocked on all counts relating to the burglary and theft of Mr. Moore's home and property.

Count seven of the Information charged defendant with a violation of Penal Code section 496 and was read to the jury as follows: "On or about April 28, 2000, at Walnut Creek, in Contra Costa County, the defendant, DARRELL TYJUAN ALLEN, did unlawfully buy, receive, conceal, sell, withhold, and aid in concealing, selling, and withholding *electronic equipment, clothing, and firearms*, property which had been obtained by theft and by extortion, knowing that the property had been stolen and obtained by extortion." (Italics added.) At the beginning of the trial, the Prosecutor told

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\* Part II.B. of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

<sup>11</sup> CALJIC No. 17.01 reads, "The defendant is accused of having committed the crime of \_\_\_\_\_ [in Count \_\_\_\_\_]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count \_\_\_\_\_] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count \_\_\_\_\_], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

the jury that none of Mr. Moore's guns were stolen. The jury heard testimony that the property stolen from Mr. Moore included a watch, a tie tack, a high school ring, a diamond ring, two cameras and a cell phone. Of these items, only two would fit within the description contained in the information—the cameras and a cell phone as electronic equipment—and none would fit the description of clothing and firearms. The property stolen from Mr. Picchi's home, however, included two handguns, ammunition, a DVD player, CDs, two cameras, a cell phone, and six or nine t-shirts. These items match precisely the property descriptions contained in count seven. As such, the only reasonable conclusion is that count seven charged defendant with receiving stolen property based upon his possession of Mr. Picchi's property.

This conclusion is further supported by the prosecutor's closing argument. The prosecutor argued that "Officer Bennett saw the defendant holding a bag with Mr. Picchi's property in it, with two handguns loaded, with a DVD player, the shirts and a camera. Defendant was holding his property." He later argued: "As for receiving stolen property, . . . we have Officer Bennett seeing defendant holding a black duffel bag, which it was Mr. Picchi's black duffel bag, which kind of adds insult to injury. But anyway, sees he is holding the black duffel bag. When it's opened up, they find guns."

Finally, the jury's verdict demonstrates that it understood that this count was based upon defendant's possession of Mr. Picchi's property. The jury deadlocked on count one charging the burglary of Mr. Moore's home, count three charging the burglary of Mr. Picchi's home and count two charging grand theft of Mr. Moore's property. The jury convicted defendant, however, of grand theft of Mr. Picchi's property, of grand theft of a firearm from Mr. Picchi, and of possessing a firearm.<sup>12</sup> These counts all relate to Mr. Picchi's property contained in the black duffel bag. There is no reason to conclude that the jury's verdict on the receiving stolen property count was not likewise based upon the same property.

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<sup>12</sup> As to defendant's sentencing, see footnote 3, *ante*, page 5.



For these reasons, the cases relied upon by defendant are distinguishable from the present case. In *People v. Wesley* (1986) 177 Cal.App.3d 397, the defendant was charged with a single count of possession of a controlled substance “ ‘to wit, cocaine *and* heroin.’ ” (*Id.* at p. 400.) The court found that it was error not to give a unanimity instruction where defendant could have violated the single charge by either possession of the cocaine found on his table or the heroin found in his waistband. (*Ibid.*) Similarly in *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1070-1071, the court found error where defendant was charged with a single count of possession of a controlled substance but the evidence revealed potential violations based upon either constructive possession of heroin found on his television set or actual possession of heroin later found in his pocket. Here, unlike *Wesley* and *Castaneda*, the information makes clear that the stolen property at issue was that which came from Mr. Picchi’s residence, and the manner in which the trial was conducted makes clear that there was no possibility of confusion.

Accordingly, the trial court was not required to instruct the jury *sua sponte* with CALJIC No. 17.01.

C. CALJIC No. 17.41.1\*

Finally, defendant contends it was error to instruct the jury in accordance with CALJIC No. 17.41.1 as follows: “The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper factors, it is the obligation of the other jurors to immediately advise the Court of the situation.” Defendant suggests that the reading of CALJIC No. 17.41.1 denied him a fair trial by undermining the privacy of the jurors’ deliberation and denying his right to a unanimous verdict.

The California Supreme Court recently reviewed this issue, concluding that while the instruction does not infringe upon the defendant’s federal or state constitutional right

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to a unanimous verdict, it does intrude unnecessarily into the deliberative process. The court affirmed the defendant's conviction, finding no evidence of prejudicial error, but advised that the instruction not be given in criminal cases in the future. (*People v. Engelman* (2002) 28 Cal.4th 436.) Because this matter must be reversed on the basis of the *Batson/Wheeler* error, it is unnecessary to determine whether this instruction caused prejudicial error in this case. Presumably, the court will not instruct the jury with CALJIC No. 17.41.1 when this matter is retried.

### **III. DISPOSITION**

The judgment is reversed and the matter remanded for a new trial.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Parrilli, J.

## APPENDIX

Ms. W.'s voir dire examination in full was as follows:

THE COURT: Q. Ms. W., have you been able to hear all the questions asked so far?

MS. W.: A. Yes.

Q. I'm sorry?

A. Yes, sir.

Q. Just keep in mind that this young woman has to take down what you and I say, so you have to speak up for us.

A. Okay.

Q. Anything that you heard so far which makes you feel you couldn't be fair to both sides here?

A. No.

Q. You're a benefit authorizer, with whom?

A. Social Security Admin.

Q. Okay. I suppose I should know about that. Okay. And you have a close friend or a family member in the legal business?

A. A cousin.

Q. And where does he or she practice?

A. In Los Angeles.

Q. I'm sorry?

A. Los Angeles.

Q. And you know what kind of law?

A. I believe it's corporate.

Q. Okay. And anything about that relationship which you believe would affect your ability to be fair to both sides here?

A. No.

Q. And you have indicated that you or a family member or close friend has been a victim, witness or defendant in a criminal matter. Will you tell me about that, please?

A. I believe it was like four years ago we were burglarized. Someone broke into our home and took some things.

Q. Did a trial result from that?

A. No, just the police report.

Q. All right. Have you had any dealings with the district attorneys office?

A. No.

Q. Any public defenders office or any other defense office?

A. No.

Q. Is there anything about that incident in your life which you feel would affect your ability to be fair to the defendant or the People in this matter?

A. No.

Q. Because we are dealing with a burglary in this case. Are you sure about that?  
 A. Yeah.  
 Q. All right. Would you be satisfied with 12 people in your frame of mind sitting on your jury if you represented the People or the defendant in this case?  
 A. Excuse me?  
 Q. All right. Try that again. Would you be satisfied with 12 people in your current frame of mind if you were either representing the People or the defendant in this matter --  
 A. Yes.

Ms. T.'s voir dire examination in full was as follows:

THE COURT: Q. Do you prefer [name]?

A. [T.] is fine.  
 Q. All right. You didn't tell us what your occupation is?  
 A. I'm a programmer analyst with Kaiser.  
 Q. Okay. And how long have you been in that capacity?  
 A. I've been with Kaiser for 10 years and --  
 Q. I'm sorry?  
 A. -- about 18 months, almost two years.  
 Q. Where were you employed prior to that?  
 A. I've been with Kaiser ten years, so it's been a long time.  
 Q. Different jobs?  
 A. Yeah, different roles at Kaiser.  
 Q. And you told -- at least you indicate that you have some friends or close relatives in law enforcement?  
 A. I have a cousin. I have a maternal cousin and paternal cousin. My maternal cousin is a law enforcement officer in Vacaville. My paternal cousin at one time worked for the East Palo Alto Police Enforcement.  
 Q. And the one in Vacaville's with the Police Department up there?  
 A. Yes.  
 Q. Okay. Anything about those relationships which you feel would affect your ability to be fair to both sides here?  
 A. No.  
 Q. And you won't -- you I don't want to go through it all over but --  
 A. It's okay.  
 Q. You won't give a police officer any more weight than any other?  
 A. No, sir. No, sir.  
 Q. All right. Okay. Thank you.

MR. DEMERTZIS: Actually, Judge, before we leave Miss [T.], she circled No. 11 and I don't know if there's any significance to that.

THE COURT: Okay. You're absolutely right.

MS. T.: What's No. 11?

THE COURT: Q. Counsel pointed out that question No. 11 -- I'll read it to you. Do you have any moral, religious or other principles which would make it difficult to determine whether someone's guilty or not guilty of a crime? You didn't answer yes or no, but you circled the question.

A. Because I think moral or religious and other covers a wide range, and I'd like for this to address this particular situation. I would be fair and impartial or try to be fair and impartial. I just circled it because I didn't understand what was being asked of me at the time.

Q. Okay. Well do you think that you can, without reservation, make your decision in this case based upon the law that I give you, the evidence you hear in the courtroom or see in this courtroom, and your common sense, and not any other preconceived notion or whatever? Can you do that?

A. Yes.

Q. Okay. And no doubt in your mind about that?

A. No.

Trial court:	Contra Costa County Superior Court
Trial judge:	Honorable John F. Van De Poel
Counsel for plaintiff and respondent:	Bill Lockyer, Attorney General Robert R. Anderson, Chief Assistant Attorney General Ronald A. Bass, Senior Assistant Attorney General Stan M. Helfman, Supervising Deputy Attorney General Violet M. Lee, Deputy Attorney General.
Counsel for defendant and appellant:	Thomas M. Singman, under appointment by the Court of Appeal.